No. ________

In The

Supreme Court of the United States

JAMES E. BACHMAN, et al.,

Petitioners,

v.

JOHN Q. BACHMAN;
LEAF SUPREME PRODUCTS, LLC,
A Nebraska Limited Liability Co.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether a case can be dismissed for plaintiffs' refusal to answer questions related to past and current employers in a deposition related to a wage and hour complaint where the employees pleaded retaliation. The Plaintiffs had been fired within 24 hours of the employer being notified of a Department of Labor complaint, in conflict with *Centeno-Bernuy v. Becker Farm,* 219 F.R.D. 59, 61-62 (W.D.N.Y. 2003) and numerous other District Court decisions.

2) Whether an Employer who directs that wages will not be paid, files several years of tax returns stating no wages were paid and retaliates is entitled to equitable defenses. Plaintiffs assert that equitable defenses are not permitted in conflict with the 11th Circuit Decision in *Bailey v. Titlemax of Georgia,* 776 F.3d 797, 805-806 (11th Cir. 2015)

3) Whether an Employer who directs that wages will not be paid, retaliates, and does not treat or document the Employees' withdrawals as wages can plead affirmative defenses and counterclaims including fraud in conflict with the Fifth Circuit Decision in *Gagnon v. United TechniSource Inc.*, 607 F.3d 1036, 1045 (5th Cir. 2010) and whether the FLSA is correctly enforced when willful violation of the Act can be defended with these arguments.

PARTIES TO THE PROCEEDING

Petitioners James Bachman, Adella Bachman, Eric Bachman, Andrew Bachman, Rachel Bachman, and Matthew Bachman were the Plaintiffs in the district court proceedings and the Appellants in the Eighth Circuit Court of Appeals proceedings. Respondents Leaf Supreme Products, LLC and John Q. Bachman were the defendants in the District Court proceedings and Appellees in the Court of Appeals proceedings.

STATEMENT OF RELATED CASES

James E. Bachman, et. al., v. John Q. Bachman, et. al. Eighth Circuit Court of Appeals Doc. No. 1638, Motion for Rehearing and Rehearing en Banc denied August 4, 2023

James E. Bachman, et. al., v. John Q. Bachman, et. al. Eighth Circuit Court of Appeals Doc. No. 1638, District Court Judgment Affirmed June 30, 2023

James E. Bachman et. al., v. John Q. Bachman, United States District Court for the District of Nebraska, Case No. 8:19-cv-00276-BCB-CRZ Case dismissed with prejudice December 9, 2023

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OPINIONS BELOW

The opinion of the Court of Appeals denying Appellants' Motion for Rehearing and Rehearing En Banc is reported at 2023 U.S. LEXIS 20244 (8th Cir.), the original opinion denying Appellants' Appeal 2023 U.S. App. LEXIS 16576 (8th Cir. 2023) and the District Court Dismissal, 2021 U.S. Dist. LEXIS 221583 (D. Neb. 2021).

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 2023. A timely Motion for Rehearing and Rehearing En Banc was timely filed and denied on August 4, 2023. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 215, Title 29 of the U.S. Code provides:

> After the expiration of one hundred and twenty days from June 25, 1938,
>
> it shall be unlawful for any person –
>
> **3)** to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to

> be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

Section 216, Title 29 of the U.S. Code provides:

Damages; right of action; attorney's fees and costs; termination of right of action

(B) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) or 218d of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) or 218d of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. Any employer who violates section 203(m)(2)(B) of this title shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages. An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and on behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) or 218d of this title.

INTRODUCTION AND STATEMENT OF THE CASE

Leaf Supreme Products, LLC is a Nebraska Limited Liability Company. For all times relevant herein, John Bachman was the 66 and 2/3% owner of Leaf Supreme Products, LLC. Because of the familial relationship, the Plaintiffs assumed substantial debt on behalf of the company at its inception. On August 30, 2016, John Q. Bachman sent an email to the Appellants stating that no wages would be paid until cash flow improved and a later email affirmed that no wages would be paid. From October 1, 2016, until April 4, 2019, the Appellants were paid nothing for their work at Leaf Supreme Products, LLC. During this period, Plaintiffs advanced a minimum of $324,821.64 to pay necessary company expenses. The Defendants' First Counterclaim alleges that the Plaintiffs withdrew in excess of $100,000. The Plaintiffs considered this partial reimbursement for the funds they had advanced. Each transaction appeared in the bank statements to which the Defendants had continuous access. These repayments were not accurately recorded in the books because the Defendants had ordered that there would be no reimbursement for funds advanced to the company. John Bachman wrote, "The reimbursements to Andrew must stop. He works at LSP and no salaries are paid. The IRS will look at this as employment compensation and I am ultimately responsible for any unpaid employment taxes . . . "

In a letter dated March 29, 2019, the Department of Labor informed Leaf Supreme Products, LLC that it was investigating. The following day after receiving this notice, John Q. Bachman fired the Appellants. A Department of Labor investigation found Leaf Supreme

Products, LLC was subject to the FLSA and owed the Appellants $256,214.50 for 2 years' work.

Despite the employer's unclean hands, the District Court permitted the Appellees to plead equitable and affirmative defenses as well as to plead counterclaims that were not related to wages paid. This ruling is in direct violation of *Bailey v. Titlemax of Georgia*, 776 F.3d 797, 805-806 (11th Cir. 2015) which requires an employer to have clean hands before it can raise equitable defenses and *Martin v. Pepsiamericas, Inc.*, 628 F.3d 738 (5th Cir. 2010) which limits employer counterclaims to wages paid. By affirming the District Court's decision, the Eighth Circuit has created a split in the circuits.

At the depositions, the Appellants refused to answer some questions unrelated to hours worked and wages paid. Additionally, at the depositions, two of the Appellants were asked to name their past and present employers. As a result of their refusal to answer these questions, which were clearly barred by precedent FLSA rulings, the Appellants' case was dismissed with prejudice.

In *M. S. v. Wermers*, 557 F.2d 170 (8th Cir. 1977) the 8th Circuit held, "A district court has power to dismiss an action for failure of the plaintiff to comply with any order of court." Fed.R.Civ.P. 41(b) . . . In reviewing such an order, we consider whether in the exercise of its power the district court has exceeded the permissible range of its discretion. . . . Another legitimate inquiry is whether dismissal was bottomed upon the plaintiff's refusal to obey an invalid or improper order." In this case, requiring an employee to answer questions about their past and present employment which are unrelated to hours worked and wages paid violates the FLSA. *Brennan v. Heard*, 491 F.2d 1, 4 (5th Cir. 1974). In *Brennan*, the Fifth Circuit Court of Appeals held:

> The only economic feud contemplated by the FLSA involves the employer's obedience to minimum wage and overtime standard. To clutter these proceedings with the minutia of other employer-employee relationships would be antithetical to the purpose of the Act.

Id. at 4.

Additionally, questions regarding past and present employers are prohibited if there has been retaliation. "The very purpose for which defendants seek this information, to wit, to enable them to discuss plaintiffs' allegations of illegal treatment by their former landlords/employers with plaintiffs' current landlords/employers, is inherently intimidating." *Centeno-Bernuy v. Becker Farm*, 219 F.R.D. 59, 61-62 (W.D.N.Y. 2003).

The Appellees filed a motion to compel and for sanctions because the Appellants' refusal to answer questions related to the equitable and affirmative defenses as well as the counterclaims. The Magistrate Judge granted the Appellees' motion to compel and held: "Essentially, Plaintiffs' argument is premised on their legal contention that Defendants' affirmative defenses and counterclaim are improperly asserted." (App. 62).

It is correct that the Appellants asserted that equitable and affirmative defenses and counterclaims were prohibited in this case since the Defendants clearly had unclean hands. To contest this erroneous ruling, the Appellants appealed to the District Court. The District Court affirmed the ruling and ordered the Appellants to inform the Court within five days that they would attend the rescheduled depositions. At no point in these proceedings had the Plaintiffs failed to appear for any scheduled appearances. The Plaintiffs' counsel underwent a medical procedure on November 17, 2021, for which he required opioid pain medication. This was the same day the 5-day requirement was issued by the Magistrate. Unfortunately, the undersigned counsel misread the docket entry and did not inform the Court within five days that the Appellants would attend the depositions which were scheduled in December. The Magistrate Judge recommended the case be dismissed with prejudice on November 23, 2021, and the District Court agreed. In its dismissal order, the District Court held:

> Furthermore, Plaintiffs have repeatedly litigated the issue whether Defendants may assert affirmative defense. Magistrate Judge Zwart settled this issue on September 19, 2019 Filing 43 (audio file), Filing 44, yet over two years later Plaintiffs continued to contest this issue. See Filing 217 (October 12, 2021). Plaintiffs have behaved similarly with respect

> to Defendants' counterclaims. See Filing 145 (finding that Defendants could conduct discovery on their counterclaims). Plaintiffs have simply ignored the Court's rulings and used their belief that affirmative defenses and counterclaims in this case are unwarranted as a basis to refuse to answer questions in depositions and to generally resist discovery.

(App. 99-100).

The subsequent dismissal was grounded not only upon an erroneous ruling as a matter of law since employers that knowingly fail to pay wages and retaliate are not permitted to plead equitable defenses. Additionally, the counterclaims did not involve wages as required and discussed later in this petition. Accordingly, the District Court also erred when it dismissed the case and the Eighth Circuit Court of Appeals erred when it affirmed the District Court's ruling.

In its ruling the Eighth Circuit held that the Appellants had filed frivolous motions related to the initial preliminary injunctions filed when John Q. Bachman was attempting to close the business which he eventually succeeded in doing, costing the Plaintiffs a substantial investment as well as their labor. 28 U.S.C. § 216(b) specifically provides for injunctive relief, however there are other requirements as well. Due to the threat of foreclosure and the lack of time, mistakes were made, but despite this allegedly serious infraction, the District Court entered no sanctions.

As far as the other motions, with one exception, all were related to allowing the Appellees to wrongly plead equitable and affirmative defenses, as well as counterclaims which are barred in other Federal Circuits who have ruled on this. Additionally, the District Court initially did not enter sanctions for these infractions.

The ex parte phone call related to the undersigned counsel informing the Court's staff that a mistake had been made in a filing. Again, no disciplinary action was taken, and this was never mentioned until the dismissal.

The undersigned counsel was contacted by a third party regarding a subpoena he had received in this proceeding that gave him only 5 days' notice in violation of the local 7-days' notice rule. Because the subpoena failed to comply with the rules, the party's attendance should not have been required, although he did appear on his own volition. Again, no disciplinary action was taken by the Court.

This litigation continued for more than two years. Due to this length, it is understandable that mistakes were made. The gravity of these errors was magnified in order to justify a dismissal. But these mistakes were minor in comparison to District Court rulings that were contrary to the following circuit courts of appeals' rulings:

1) Permitting an employer with unclean hands to plead equitable defenses and counterclaims. *Bailey v. Titlemax of Georgia*, 776 F.3d 797, 805-806 (11th Cir. 2015).

2) Permitting laches to be pleaded when there is a statute of limitations. *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 926 (9th Cir. 1975).

3) Permitting in pari delicto to be pleaded when the employer directed that wages would not be paid. *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1309 (11th Cir. 2013).

4) Permitting a set-off to be pleaded when the set-off does not involve wages. *Martin v. Pepsiamericas, Inc.*, 628 F.3d 738 (5th Cir. 2010).

5) Permitting a counterclaim for fraud to be pleaded *Gagnon v. United TechniSource, Inc.*, 607 F.3d 1036, 1045 (5th Cir. 2010).

6) Permitting more than 6 months for a jurisdictional challenge when retaliation has been pleaded. *Sapperstein v. Hager*, 188 F.3d 852, 856-857 (7th Cir. 1999), *Bowe v. Judson C. Burns, Inc.*, 137 F.2d 37, 38 (3d Cir. 1943), *Meek v. United, supra,* and *Acosta v. Foreclosure Connection, Inc.*, 903 F.3d 1132, 1135-1136 (10th Cir. 2018).

By affirming the District Court's rulings, the Eighth Circuit has created numerous splits in the circuit courts. More importantly, allowing more than 6 months to challenge jurisdiction, permitting an employer with unclean hands to plead equitable and affirmative defenses as well as bring counterclaims, threatens to delay the proceedings, which is a direct threat to the enforcement scheme of the FLSA.

REASONS FOR GRANTING THE PETITION

A. The Eighth Circuit Court of Appeals Erred as a Matter of Law When it Affirmed a District Court Ruling Dismissing the Appellants' Case with Prejudice when the Dismissal was Predicated Upon Allowing an Employer that had Knowingly Committed Wage Theft and had Retaliated to Plead Equitable Defenses and Counterclaims

As grounds for dismissal in its ruling the District Court held:

> Furthermore, Plaintiffs have repeatedly litigated the issue whether Defendants may assert affirmative defense. Magistrate Judge Zwart settled this issue on September 19, 2019 Filing 43 (audio file), Filing 44, yet over two years later Plaintiffs continued to contest this issue. See Filing 217 (October 12, 2021). Plaintiffs have behaved similarly with respect to Defendants' counterclaims. See Filing 145 (finding that Defendants could conduct discovery on their counterclaims). Plaintiffs have simply ignored the Court's rulings and used their belief that affirmative defenses and counterclaims in this case are unwarranted as a basis to refuse to answer questions in depositions and to generally resist discovery.

(App. 99-100).

This ruling was based upon the initial ruling by the original District Court. In her ruling she held:

> Plaintiffs argue that the FLSA prevents Defendants' equitable defenses of estoppel, laches, and unclean hands. It is true "that FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740, 101 S.Ct. 1437, 67 L.Ed. 641 (1981). Accordingly, if Defendants argue that Plaintiffs waived rights under the FLSA to which they were otherwise entitled, such a defense would be invalid. However, in certain circumstances, courts have allowed defendants to assert equitable defenses in FLSA actions. *See Bailey v. Titlemax of Georgia, Inc.*, 776 F.3d 797, 804 (11th Cir. 2015). Absent discovery on these issues, the Court cannot determine whether such defenses are applicable.

(App. 29).

The ruling by the District Court is based upon an incomplete reading of *Bailey* that could not have included the language stating that knowing of ongoing FLSA violations bars an employer from invoking equitable defenses.

At the time of the first ruling, the original District Court was aware John Q. Bachman had directed that the wages not be paid, knew wages had not been paid, knew FICA taxes had not been paid on the Appellants' withdrawals/reimbursements (this prevented them from being classified as wages which is discussed in greater detail later in this Petition), knew their corporate returns from 2017-2019 stated that zero wages were paid, and knew that the Defendants had retaliated. The foregoing, unrefuted facts are controlling and show that the Defendants did not have the necessary clean hands required to raise equitable defenses according to *Bailey v. Titlemax*.

The initial reference to *Bailey* by the original District Court referred only to the first part of the ruling and, because of this, is erroneous as a matter of law.

In *Bailey v. Titlemax of Georgia*, 776 F.3d 797, 805-806 (11th Cir. 2015), the 11th Circuit held:

> (I)f an employer knew its employee underreported his hours, can it still assert equitable defenses based on the employee's own conduct in underreporting as a total bar to the employee's FLSA claim? . . . Our answer is no.

Id. at 799.

The Court continued:

> Where, as here, an employer knew or had reason to know that its employee underreported his hours, it cannot invoke equitable defenses.

Id. at 805.

The failure to consider the language directly above in the first District Court ruling resulted in the subsequent rulings that were made as though that language was absent.

The foregoing is consistent with rulings in the Eighth Circuit. In *Smith, et al. v. World Insurance Group*, 38 F.3d 1456, 1462-1463 (8th Cir. 1994), the Eighth Circuit held: "(b)efore we can apply an equitable doctrine, we must determine "whether he who seeks equity has done equity."

In *Grey v. City of Oak Grove*, 396 F.3d 1031, 1034 (8th Cir. 2005), the Eighth Circuit held that to establish a prima facia case of retaliation, the employee must show: "(t)o establish a prima facie case of retaliation, appellant had to show that he participated in statutorily protected activity, that appellees took an adverse employment action against him, and that there was a causal connection between them. *Id.* at 1034-1035.

In the case at hand, the Appellants were terminated the following day after John Bachman was informed of the Department of Labor complaint. This meets the definition of retaliation pursuant to 29 U.S.C. § 215(a)(3). In *Johnson v. Ergon W. Va., Inc.*, 205 U.S. Dist. LEXIS 120759, at *21, the District Court held: Any willful act concerning the cause of action which can be said to transgress equitable standards of conduct is sufficient" to invoke the clean hands doctrine. Retaliation is an intentional act and is prohibited by statute. Therefore, based upon his willful nonpayment of wages and retaliation, John Q. Bachman could not plead equitable defenses and when the

District Court held that he could, the ruling was erroneous as a matter of law.

Unfortunately, permitting the Appellees to raise equitable defenses was not the only ruling that was contrary to the law in the other circuits. However, the first errant ruling provided the basis for most of the other problematic rulings. The District Court also erred as a matter of law and accordingly abused its discretion when it permitted the Appellees to plead a setoff as a counterclaim and to plead affirmative defenses.

In the case at hand, the Appellees filed an amended complaint and pleaded a counterclaim based upon a setoff. The Appellants filed a motion to strike which the Judge Magistrate and the District Court overruled. (App. 31-51, App. 52-59).

The following is a summary of the affirmative defenses the Appellees were permitted to plead.

Affirmative Defenses	**Contradiction of Precedent**
"Plaintiffs were not employees of Defendant."	The District Court held that Appellees qualified for individual coverage under the FLSA.
"Defendants acted in good faith and had reasonable grounds for believing their actions were in compliance with the FLSA, the Nebraska Wage Payment and Collection Act and the Texas Payday Act."	John Bachman sent the following via email, "no wages will be paid until cash flow improves" (App. 9, R. Doc. 13-2, p. 1) (App. 45, R. Doc. 26-10). As a licensed Nebraska Attorney John Bachman knew or

	should have known of minimum wage laws. John Bachman cannot meet this standard as a matter of law because he knew of the violation. *Davila v. Menendez*, 717 F.3d 1179, 1189 (11th Cir. 2013).
"Plaintiffs are estopped from claiming payment in this matter."	Estoppel is a defense that invokes equity. *Smith, et al. v. World Insurance Group*, 38 F.3d 1456, 1462-1463 (8th Cir. 1994), parties with unclean hands may not invoke equitable defenses. John Bachman ordered that wages not be paid and fired employees in retaliation for making a complaint. As such Appellees are barred from equitable defenses.
"Plaintiffs are barred by the doctrines of waiver, estoppel and laches."	Waiver, estoppel, and laches all are defenses that invoke equity, as the Appellees do not have clean hands they are barred from these defenses in accordance with *Smith, et al. v. World Insurance Group*, 38 F.3d 1456, 1462-1463 (8th Cir. 1994), *Bailey v. Titlemax of Georgia*, 776 F.3d 797, 805-806 (11th Cir. 2015),

	Miller v. Maxwell's Intern. Inc., 991 F.2d 583 (9th Cir. 1993) the Ninth Circuit held, "doctrine of laches is inapplicable when Congress has provided a statute of limitations to govern the action. *See*, *e.g.*, *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 926 (9th Cir. 1975)." The FLSA has a well-established statute of limitations, thus the defense of laches does not apply.
"Plaintiffs' claims are barred by the doctrine of unclean hands."	The Appellees do not have clean hands and cannot raise clean hands as a defense. *Smith, et al. v. World Insurance Group*, 38 F.3d 1456, 1462-1463 (8th Cir. 1994), *Bailey v. Titlemax of Georgia*, 776 F.3d 797, 805-806 (11th Cir. 2015).
"Plaintiffs' claims are barred by the doctrine of in pari delicto."	In *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299 (11th Cir. 2013), the 11th Circuit held "The *in pari delicto* defense may be applied to bar recovery under a federal statute only where (1) the plaintiff bears at least substantially equal

	responsibility for the violations he seeks to redress, and (2) preclusion of the suit would not substantially interfere with the statute's policy goals. *See Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310-11, 105 S.Ct. 2622, 86 L.Ed.2d 215 (1985); *Edwards*, 437 F.3d at 1154-55." In the case at hand the Appellees, ordered that no wages be paid. For all times relevant, the Appellees were the majority owner of the company, the employees had no ownership. In *Coffin v. Blessey Marine Services, Inc.*, 771 F.3d 276 (5th Cir. 2014), the Fifth Circuit affirmed a District Court opinion that held, "there is no duty to mitigate damages under the FLSA, nor a duty to provide notice as to any alleged unlawful pay practice); *Lopez v. Autoserve, LLC*, No. 05 C 3554, 2005 U.S. Dist. LEXIS 29161, 2005 WL 3116053, at *2 (N.D. Ill. Nov. 17, 2005)." *In pari delecto* requires

	plaintiffs to bear substantially equal responsibility.
"If it is determined that Plaintiffs were mischaracterized as nonexempt employees under the FLSA, they were paid in excess of any minimum wage and or overtime by the executive team (Plaintiffs) of Defendant Leaf Supreme. Plaintiffs' did not treat such compensation as wages."	In *Martin v. Pepsiamericas, Inc*., 628 F.3d 738, 743 (5th Cir. 2010), the Fifth Circuit held: Pepsi is not entitled to set-off those damages here because unlike *Singer*, the money and benefits Pepsi paid to Martin were not "wage payments, advance or otherwise." *Id.* at 743. Leaf Supreme Products never paid FICA taxes which are required on all wage payments. Accordingly, since the Appellees violated Federal law when they failed to pay the FICA taxes, they have waived their right to consider these payments as wages.

The Appellees listed three counterclaims in their motion to compel for which they claimed they were entitled to conduct discovery, which is a clear departure from established precedent in other circuits.

"Defendants, in their counterclaim, allege three theories":

Counterclaims	**Contradiction of Precedent**
"In their First Cause of Action, Defendants allege that James Bachman, Adella and Eric Bachman were in control of Defendant Leaf Supreme and were responsible for the failure to pay wages. Instead, Plaintiffs-Counter Defendants, paid themselves in other ways. For example, they paid all of their car leases (equaling almost $2,000 a month) as well as their home leases (equaling $3,600 a month) using Leaf Supreme's bank account. There were also a number of personal expenses paid on their behalf during the time they were in control of Leaf Supreme."	In *Gagnon v. United Tech niSource Inc.*, 607 F.3d 1036, 1045 (5th Cir. 2010), the Fifth Circuit stated, "contract and fraud claims cannot be brought as counterclaims in a FLSA action." As such claims of fraud are not permitted. Additionally, the Appellants in this case were at all times employees with no ownership interest. Appellees owned the bank account referenced and had continuous access to the account records. Per *Coffin* the Appellants were under no obligation to pay themselves wages, and these withdrawals were reimbursement for liabilities the company owed to the Appellants for advances of cash which to date exceed any withdrawn or reimbursed funds.
"In their Second Cause of Action, Defendants allege Fraud in that the Plaintiffs-Counter Defendants, who controlled Leaf Supreme, paid themselves	In *Gagnon v. United TechniSource Inc.*, 607 F.3d 1036, 1045 (5th Cir. 2010), the Fifth Circuit stated, "contract and fraud claims cannot be brought as

compensation for personal expenses while failing to pay themselves wages as required by the Fair Labor Standards Act. They concealed such expenditures from Defendant John Bachman."	counterclaims in a FLSA action." As such claims of fraud are not permitted.
"In their Third Cause of Action, Defendants allege that if Plaintiffs-Counter Defendants and the rest of the Plaintiffs are deemed employees Plaintiffs-Counter-Defendants' breached their fiduciary duty to Defendants by failing to pay wages when there were funds available to pay wages. Further, Plaintiffs-Counter Defendants failed to ensure compliance with the FLSA. Any liability that Defendants may have must be assessed to Plaintiff-Counter Defendants."	In *Lyle v. Food Lion, Inc.*, 954 F.2d 984 (4th Cir. 1992), the Fourth Circuit upheld a district court's dismissal of numerous counterclaims and breach fiduciary duty citing, As the Fifth Circuit has noted, "[t]o engraft an indemnity action upon this otherwise comprehensive federal statute would run afoul of the Supremacy Clause of the Constitution" and "would undermine employers' incentives to abide by the Act." *LeCompte v. Chrysler Credit Corp.,* 780 F.2d 1260, 1264. In accordance with this ruling this is not the proper forum for claims of breach of fiduciary duty.

In its ruling to permit these counterclaims, the District Court held:

> Though couched in different theories, Defendants' counterclaims are directly related to the amount of wages owed to Plaintiffs. Defendants' first counterclaim is that Plaintiffs assumed control of Leaf Supreme and paid themselves in excess of $100,000 toward personal expenses without categorizing these payments as wages. Filing 128 at 7-8. Defendants' second counterclaim alleges that Plaintiffs fraudulently paid themselves money for personal expenses without characterizing these payments as wages. Filing 128 at 8. Defendants' third counterclaim alleges that Plaintiffs breached a fiduciary duty to Leaf Supreme by failing to treat payments for Plaintiffs' personal expenses as wages for work performed. Filing 128 at 9. Without addressing the merits of each of these counterclaims, each alleges that Plaintiffs received payments from Leaf Supreme that should have been categorized as wages. If successful on these counterclaims, any setoff would not cause Plaintiffs to receive less payment than they were entitled to under the FLSA but would account for wages Plaintiffs had already been paid.

(App. 57-58).

> The Court does not conclude at this stage that Defendants' counterclaims have merit.

> Discovery is necessary to determine whether the evidence supports Defendants' position.

(App. 58).

First, a setoff is an equitable remedy. *Hawaiian Airlines, Inc. v. United States (In Re HAL, Inc.)*, 122 F.3d 851, 854 (9th Cir. 1997). As previously discussed, the Appellees do not have clean hands and are accordingly prohibited from using equitable remedies, including setoffs. More importantly, only a counterclaim involving the payment of wages is permitted in every other Federal Circuit Court of Appeals that has considered this issue.

More importantly, in *Martin v. Pepsiamericas, Inc.*, 628 F.3d 738, 743 (5th Cir. 2010), Pepsi attempted to use a set off against Martin's wage claim for a breach of a severance agreement. The Fifth Circuit held: Pepsi is not entitled to set off those damages here because unlike *Singer*, the money and benefits Pepsi paid to Martin were not "wage payments, advance or otherwise." *Id.* at 743.

The Federal Insurance Contribution Act (hereinafter FICA) (26 U.S.C. § 3101) mandates that all employers pay FICA taxes on their employees' wages. In the case at hand, Leaf Supreme Products never paid any FICA taxes on the withdrawals it claimed the Appellants made instead of paying wages.

In *Buffum v. Chase Nat'l Bank*, 192 F.2d 58, 60-61 (7th Cir. 1951), the Court held:

> Waiver is a voluntary and intentional relinquishment or abandonment of a known existing right or privilege, which, except for such waiver would have been enjoyed . . . It may be expressed formally, or it may be implied as a necessary consequence.

Obviously, the failure to pay FICA taxes which must be paid on all wages by an employer prohibits the Appellees from claiming the alleged withdrawals by the Appellants are wages. Additionally, the Defendants' tax returns for 2017-2019 state wages paid as zero. If this Court rules otherwise, it is allowing a company to flout its obligations under the Internal Revenue Code and is suborning tax fraud.

Once again, the District Court was informed that the Appellees failed to pay the FICA taxes not only prior to the Appellants' motion to strike the affirmative defenses and counterclaims, but prior **to the Plaintiffs' motion for summary judgment**. (Emphasis added). The Appellees failed violated Federal law when the Appellees failed to pay FICA taxes on the Appellants' withdrawals as required by law if they were indeed wages. They repeatedly filed tax returns, signed under penalties of perjury, reporting no wages had been paid. Therefore, they have waived their rights to consider these payments as wages. As a result, the District Court's decision to permit the Appellees to file a counterclaim is erroneous as a matter of law because it is direct conflict with *Pepsiamericas*.

In *Donovan v. Pointon*, 717 F.2d 1320 (10th Cir. 1983), the Secretary of Labor brought an action under the Fair Labor Standards Act. The employer counter-claimed for moneys he had advanced to the employees as well as damages for sabotage. The District Court dismissed the counterclaims and the employer appealed. The Tenth Circuit held:

> As indicated, the purpose of the present action is to bring Pointon into compliance with the Act by enforcing a public right. To permit him in such a proceeding to try his private claims, real or imagined, against his employees would delay and even subvert the whole process. Pointon is free to sue his employees in state court, as we are advised he is doing, for any sum which he feels is due and owing him.

Id. at 1323.

By permitting the Appellees to pursue their real or imagined claims in an FLSA proceeding, the District Court erred as a matter of law. When the Eighth Circuit Court of Appeals affirmed this erroneous ruling, they also erred as a matter of law.

B. The District Court's Rulings are Contrary to Numerous Other Federal Circuits as Well as Contrary to Their Own Rulings

The following Federal Circuit Court of Appeals rulings are contrary to the Eighth Circuit Court of Appeals ruling:

1) Permitting an employer with unclean hands to plead equitable defenses and counterclaims. *Bailey v. Titlemax of Georgia, supra.*

2) Permitting laches to be pleaded when there is a statute of limitations. *International Tel. & Tel. Corp. v. General Tel. & Elec., supra.*

3) Permitting in pari delicto to be pleaded when the employer directed that wages not be paid. *Lamonica v. Safe Hurricane Shutters, Inc., supra.*

4) Permitting a set-off to be pleaded when the set-off does not involve wages. *Martin v. Pepsiamericas, Inc., supra.*

5) Permitting a counterclaim for fraud to be pleaded. *Gagnon v. United TechniSource, Inc., supra.*

6) Permitting a jurisdictional challenge when retaliation has been pleaded. *Sapperstein v. Hager, supra, Bowe v. Judson C. Burns, Inc., supra, Meek v. United States, supra*, and *Acosta v. Foreclosure Connection, Inc., supra.*

C. The District Court's Decision and the Affirmation by the Eighth Circuit Court of Appeals Pose a Direct Threat to the Enforcement Scheme of the Fair Labor Standards Act

In *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706-707, 65 S.Ct. 895, 89 L.Ed. 1296 (1945), this Court held that the FLSA recognized the fact that there was an "unequal bargaining power between employer and employee."

The case at hand is a prime example of unequal bargaining positions and the danger that is created when courts do not follow clear legal precedent. The Appellants worked for two and one-half years without pay and the District Court delayed their repayment further by failing to follow prior decisions.

First, the District Court permitted a six-month discovery delay that violated the law. (App. 6-9). Second, they allowed defenses and causes of action that clearly violated the precedent of the other circuits, thereby creating a split in the circuits which this Court must address.

Unfortunately, the District Court did not stop there. It imposed punitive sanctions on an attorney that was repeatedly attempting to invoke applicable precedent.

If this ruling is allowed to stand, allowing employers with unclean hands will soon be permitted to raise real or imagined claims which will delay and even subvert the entire process. Not only will employees be denied the wages that the Department of Labor investigation found they were owed, but employees will also be sanctioned for seeking to apply legitimate legal precedent.

CONCLUSION

If the FLSA is to truly have "remedial and humanitarian" purposes, it should be enforced according both to the provisions of the Act and in accordance with precedent. Although unrefuted evidence of the Employers' direction and knowledge of an ongoing scheme of FLSA violation was presented, the prior adjudicators showed concern only for the right of this Employer to utilize equitable and affirmative defenses to justify his willful actions. An early errant ruling became the foundation of an entire structure of erroneous rulings that created splits in authority with several other Circuits. Accordingly, certiorari should be granted in this case both to resolve these splits and to preserve the integrity and authority of the FLSA. Although the FLSA has a long history, the need to enforce and maintain its provisions still exists both for today and for the future.

Respectfully submitted,

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